

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1899 OF 2004
With
CRIMINAL WRIT PETITION NO.290 OF 2005

CRIMINAL WRIT PETITION NO.1899 OF 2004

Sushil Hiralal Chokhani,)
Aged: 51 Yrs., Occ : C.A.,)
residing at 37/1, J.B. Nagar,)
Andheri (East), Mumbai - 400 059.).. Petitioner

Vs.

1. The State of Maharashtra,)
 2. Shri Subhash Jha,)
Advocate,)
Having office at -)
1, Currimjee Building,)
111, M.G.Road,)
Opposite University,)
Fort, Mumbai - 400 023.).. Respondents
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Shri S.V.Kotwal, Advocate for the petitioner.

S/Shri D.G.Bagawe, Advocate, with D.S.Mhaispurkar, APP
for the respondents.

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CRIMINAL WRIT PETITION NO.290 OF 2005

1. Shri Sadanand Shivaji Kadam,)
Age 79 years,)
Occ: Retired from service,)
R/a.Plot No.24, Swaroop Housing)
Colony, Anand Nagar,)
Pune - 51.)
2. Smt. Shobhana Deepak Anpat,)
Age-adult, Occ: Housewife,)

R/a.Bharati Apartments, 26/1,)
Shivaji Nagar, Pune - 5.).. Petitioners

Vs.

1. Vishwajeet Anand Danke,)
Age 23 years,)
R/a.49, Anand Nagar, Pune - 51.)
2. Girish Raghunath Shinde,)
Age-adult, Occ: Advocate,)
R/a.Meghna, 1, Ganesh Mala,)
Sinhagad Road, Pune - 411 030.)
3. The State of Maharashtra.).. Respondents
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Shri S.V.Kotwal, Advocate for the petitioners.

Shri N.P.Deshpande, Advocate, for respondent Nos.1 and 2.

Shri I.S.Thakur, APP for respondent No.3.
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CORAM : R.M.S.KHANDEPARKAR &
P.V.KAKADE, JJ.

DATED : 26th APRIL, 2005.

JUDGMENT: (Per R.M.S.Khandeparkar, J)

1. Since common questions of law and facts arise in both these petitions, they were heard together and are being disposed of by this common judgment.

2. In both the petitions, rule, and by consent, the rule is made returnable forthwith. Heard the learned Advocates for the petitioners as well as the learned Advocate and APP for the respondents and the State.

3. The justifiability of the appointments of the respondent No.2 in both the petitions as the Special Public Prosecutors, at the instance and cost of the complainants in the criminal cases, is being challenged in these petitions. Apart from non compliance of the rules framed in relation to such appointment, the petitioners also complain about non compliance of the guidelines laid down by the Apex Court in **Mukul Dalal & Ors. v. Union of India & Ors.**, reported in (1988) 3 SCC 144, in that regard.

4. In Writ Petition No.1899 of 2004, the petition was initially filed challenging the vires of the Rule 22 in Chapter III of the Rules for the Conduct of the Legal Affairs of Government, 1984 as amended by the Government Amendment Rules 2002. However, the said challenge has been specifically abandoned in view of the fact that the said rule has already been amended during the pendency of the petition. The challenge in the said petition is restricted to the notification dated 12th March, 2004 by which the respondent No.2 Sri Subhash Jha, Advocate, has been appointed as the Special Public Prosecutor to conduct all the cases arising out of C.R.No.I-301 of 2003, registered at Turbhe Police Station. In Writ Petition No.290 of

2005, the petitioners challenge the notification dated 1st October, 2004 appointing the respondent No.2 Sri Girish Raghunath Shinde, Advocate, as the Special Public Prosecutor for conducting sessions case No.156 of 2004 in Sessions Court at Pune.

5. In Criminal Writ Petition No.1899 of 2004, the undisputed facts are that the complaint by one Ravindra Ahuja came to be lodged on 29th October, 2000 which was registered as C.R.No.I-301 of 2003 under Sections 467, 477(A), 408, 420, 506, 120(B) of the Indian Penal Code. Prior to the filing of the said FIR, the complainant along with his brother Vijay Ahuja had preferred a Criminal Writ Petition No.1632 of 2003 for issuance of direction to the police officers to register the FIR. In the said Writ Petition, Shri Subhash Jha, respondent No.2, had appeared as the Advocate for the petitioners in the said petition. Besides, in a Criminal Application No.1394 of 2003 preferred by the petitioner herein in the Court of Sessions at Thane for anticipatory bail and while it was heard in the said Court during the period from November, 2003 to February, 2004, the respondent No.2 herein had appeared first for the respondent who was the intervenor in the said proceedings and then has appeared as the Special

Public Prosecutor. In the Criminal Application No.687 of 2004 filed by the petitioner before this Court on 10th February, 2004, though initially the State was represented by the learned Additional Public Prosecutor in the High Court, the respondent No.2 started appearing in the said matter since 13th February, 2004 being privately engaged by the respondent No.1 and since 15th March, 2004 being appointed as the Special Public Prosecutor to represent the State.

6. In Criminal Writ Petition No.290 of 2005, the undisputed facts are that the petitioners lodged the F.I.R. under Section 447, 427 read with 34 of Indian Penal Code complaining that on 27th October, 1996 during the night hours, some persons trespassed in their property and damaged the fencing of their property and further threatened the petitioners, and on investigation, the police filed the charge sheet against the respondent No.1, his brother Abhijeet and one Amit Danke. They were however acquitted by the order dated 31st October, 2003. There are some other civil disputes pending between the petitioners and the respondent No.1. The grievance of the petitioners is that on 10th February, 2004, when the petitioner No.1 went to inquire about certain acts on the part of the

respondent No.1 and his father, they attempted to assault him with the intention to kill him and hence in self-defence the petitioner No.1 fired a bullet from his licenced revolver which resulted in the death of the father of the respondent No.1. In respect of the said incident, the petitioners lodged C.R.No.34 of 2004 under Section 307 read with 34 of Indian Penal Code, and on filing of the chargesheet, the case was committed to the Sessions Court and registered as Sessions Case No.352 of 2004. In respect of the same incident, the respondent No.1 lodged C.R.No.35 of 2004 which has also committed to the Sessions Court and registered as Sessions Case No.156 of 2004. Both the sessions cases being the cross cases, they are to be heard by the same Sessions Judge. The respondent No.2 had been appearing as the Advocate for the respondent No.1 in the Sessions Case No.352 of 2004. The respondent No.2 has also been representing the respondent No.1 in various other civil cases. The respondent No.2 came to be appointed as the Special Public Prosecutor in Sessions Case No.156 of 2004 arising out of the C.R.No.35 of 2004 lodged by the respondent No.1 against the petitioners.

7. It is the contention of the learned Advocate for the petitioners that though the Section 24(8) of

the Code of Criminal Procedure, 1973 empowers the Government to appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than 10 years as Special Public Prosecutor, the authorities have not followed the procedure prescribed for an appointment of Special Public Prosecutor and the procedure adopted is contrary to the one prescribed under the rules for the Conduct of Legal Affairs of Government, as well as contrary to the directions issued by the Apex Court in **Mukul Dalal's case (supra)**. Drawing attention to the rules for the Conduct of Legal Affairs of Government, the learned Advocate for the petitioners submitted that the Rule 22 of Chapter III thereof was struck down by the Apex Court holding the same to be ultra vires, consequent to which, the said rule was sought to be amended by the Government in the year 2002. However, the amended provision was squarely contrary to the directions issued by the Apex Court in **Mukul Dalal's case (supra)**, and the Government, having realised the same, again amended and modified the said rule by Notification dated 13th September, 2004. The contention therefore is that when the Notification appointing the respondent No.2 as the Special Public Prosecutor was issued on 12th March, 2004, the rules prescribed were contrary to the directions issued by

the Apex Court in **Mukul Dalal's case (supra)** and hence the appointment of the respondent No.2 made pursuant to the power exercised in terms of the said rule is to be held as bad in law. Even otherwise, the appointment of the respondent No.2 does not satisfy the criteria laid down by the Apex Court in **Mukul Dalal's case (supra)**. Further contention is that the respondent No.2 had been representing the complainant in the said case, and therefore, the respondent No.2 cannot be expected to hold unbiased view in the matter while performing his duties as the Special Public Prosecutor which could result in irreparable injury and prejudice to the petitioners. Reliance is placed in the decisions in the matters of **Shiv Kumar v. Hukam Chand & Anr.**, reported in (1999) 7 SCC 467, **Vijay Valia & etc. v. The State of Maharashtra & etc.**, reported in 1986 RC.LD 2093, and **Mukul Dalal's case (supra)**. The Notifications are also contended to be bad-in-law on account of their vagueness. According to the learned Advocate for the petitioners that the Notifications should disclose whether they are for a particular case or class of cases, and they cannot be for all cases as such. The very idea of appointing the Special Public Prosecutors will stand defeated, if their appointment is made for all the cases. He has further submitted that the appointments

have been made without considering the merits of the persons to be appointed as the Special Public Prosecutors.

8. The learned Advocate appearing for the State and the learned APP, on the other hand, have submitted that the power to appoint Special Public Prosecutor is provided under the provisions of Section 24(8) of the Code of Criminal Procedure, and not derived from the rules for the Conduct of Legal Affairs of Government which merely prescribe the procedure to be followed while making such an appointments. Even in the absence of the provisions of rule 22 of the said rules the power of the Government to appoint special public prosecutors is not affected. Besides, drawing attention to the Rule 18 of the said rules, it has been submitted that a precaution was taken to comply with all the relevant rules comprised under Rule 18 of Chapter III of the said Rules. There is no vagueness in the notifications and the expression "cases" refers to the miscellaneous matters in a case arising out of the C.R. No.35 of 2004. Reliance is also placed in the decisions in the matters of **Chandra Gupta, I.F.S. v. Secretary, Government of India, Ministry of Environment & Forests and Others**, reported in (1995) 1 SCC 23, **Kumaon Motor Owners' Union Ltd. & Anr. v.**

State of Uttar Pradesh, reported in AIR 1966 SC 785, **Varada Rama Mohana Rao v. State of Andhra Pradesh**, reported in (2004) 4 SCC 427, and **Union of India & Ors. v. E.G.Nambudiri**, reported in (1991) 3 SCC 38. It is further submission on behalf of the State that merely because the respondent No.2 had appeared in the matter on behalf of a private party, that is neither a disqualification for his appointment as the Special Public Prosecutor nor it leads to presumption that such a person would not be able to perform his duties as a special public prosecutor in a fair and proper manner. The learned Advocate appearing for the private respondents while reiterating the arguments advanced on behalf of the State has submitted that the respondent No.2 in the Writ Petition No.290 of 2005 would withdraw his appearance as the lawyer in the Sessions Case No.156 of 2004, and that he does not have any sort of bias against the petitioners.

9. Section 24(8) of the Code of Criminal Procedure empowers the State Government to appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor. The Government has framed the rules being the Rules for the Conduct of Legal Affairs of Government, 1984,

hereinafter called as "the said rules", and the Chapter III thereof deals with the procedure for appointment of Special Counsel and Special Public Prosecutors.

10. In terms of Rule 4 of the Chapter II of the said rules, the Remembrancer of Legal Affairs is a person, who is also the ex-officio Secretary to Government, is the administrative head of the Law and Judiciary Department. Rule 14 of Chapter II of the said rules enumerates the duties of the Remembrancer of Legal Affairs and it empowers him under sub-clause (3)(a) of the said rules to appoint a special counsel or special public prosecutor in any civil or criminal case, in which the State or its officers are either parties or in any way concerned and under clause (3)(b) thereof, he is empowered to decide their terms and fees and to make payment of their fees. Rule 15 of Chapter II of the said rules deals with delegation of functions by the Remembrancer of Legal Affairs and it provides that the functions, powers and duties to be performed by the Remembrancer of Legal Affairs shall be carried out by the officers of the Law and Judiciary Department as may be delegated to them by the Remembrancer of Legal Affairs by general or special orders.

11. The rule 21 under Chapter III of the said rules deals with the subject of appointment of special public prosecutor. Sub-rule (1) thereof provides that the Remembrancer of Legal Affairs shall appoint under sub-section (8) of section 24 of the Code of Criminal Procedure, any person, who has been in practice as an advocate for not less than ten years, as a special public prosecutor on behalf of the State to conduct any criminal case or class of cases in the High Court or subordinate court. It further provides that the proposal to that effect shall be made to him either by the District Magistrate, Commissioner of Police, Public Prosecutor or the Government officer concerned, through his administrative department. Sub-rule (2) thereof provides that the provisions of clauses (a) and (b) of sub-rule (2) of rule 18 and rule 20 shall, mutatis mutandis, apply to the appointment of a special public prosecutor.

12. Sub-rule (2) of Rule 18 of the Chapter III of the said rules deals with the procedure to be followed for engaging a special counsel on behalf of the State or its officers for the conduct of any case when it is considered necessary by any Collector or Government officer concerned. The same requires that such

officer shall send his proposal to the Remembrancer of Legal Affairs stating fully the nature of the case, evidence to be brought on record, the reasons for justifying the engagement of a special counsel, the circumstances on account of which the Government Pleader concerned cannot be entrusted with the case, the date and place of hearing of the case, the approximate number of days of hearing the case is likely to take, the details about the other counsel, if any, is proposed to be engaged, and the rate at which it is proposed to remunerate a counsel, if appointed. Rule 20 thereof deals with the preparation of briefs for special counsel appointed on behalf of the Government.

13. The Rule 22 deals with the circumstances where an appointment of a Special Public Prosecutor is at the request of a private party. The vires of the Rule 22, as it was framed originally in 1984, came up for consideration in **Mukul Dalal's case (supra)** wherein the same was held to be bad-in-law, while observing that "it would not be appropriate to accept the position that whenever an application is made it should be allowed and a Special Public Prosecutor should be appointed; this would be contrary to the spirit of the scheme of the Code. There may be cases

where a powerful complainant may have begun a proceeding to victimize his opponent. If in such a case the State concedes to the request for appointment of a Special Public Prosecutor there will be travesty of justice. Without screening on the basis of guidelines prescribed or to be prescribed, the services of a Special Public Prosecutor should not be made available to a private complainant. The primacy given to the Public Prosecutor under the scheme of the Code has a social purpose and the same would be lost if the procedure adopted by Rule 22 of Maharashtra Rules referred to above is accepted."

14. Consequent to the said decision of the Apex Court, the rule 22 of the Chapter III of the said rules was amended by the State Government. However, the amendment was not in consonance with the said ruling of the Apex Court, and therefore, the same was again amended in the year 2004, and the same is in force at present and it reads as under:-

"22. Engagement of Special Public Prosecutor.- (1) The Government in the Law and Judiciary Department, either suo-motu, or on the request of any aggrieved party or the concerned Department in the Government, may,

engage an advocate who has been in practice as an advocate for not less than ten years, and having regard to his general repute, legal acumen and suitability, by appointing him, as a Special Public Prosecutor in any criminal case or class of cases, as the case may be:

Provided that, no order under this sub-rule regarding appointment of a Special Public Prosecutor shall be made unless, for the reasons to be recorded in writing, the Remembrancer of Legal Affairs is satisfied, having regard to the nature of the case, gravity of the matter and public interest involved in the matter but such appointment is necessary.

(2) On the request of a private complainant not being the aggrieved party, the Government in the Law and Judiciary Department may, appoint any of the Public Prosecutor or Additional Public Prosecutor as a Special Public Prosecutor in accordance with the provisions of sub-rule (1), for conducting any such case.

(3) Fees for such Special Public Prosecutor, appointed under sub-rule (1) or (2), may be borne by the Government or the aggrieved party or the private complainant, as may be directed by the Remembrancer of Legal Affairs;

Provided that, in cases where the aggrieved party is, a Bank or an Institution or Trust or the like, the fees shall be borne by such aggrieved party:

Provided further that, the amount of the fees to be paid to such Special Public Prosecutor, shall be deposited with the Government in the Law and Judiciary Department first, and the same shall be paid by it to such Special Public Prosecutor on completion of the trial, unless directed otherwise by the Remembrancer of Legal Affairs."

15. The above quoted Rule 22 which pertains to the procedure for appointment of Special Public Prosecutor at the request of a private party has been in force since 13th September, 2004, and it provides that such appointment by the Government can be of an advocate

who has been in practice for not less than ten years but only after taking into consideration his general repute, legal acumen and suitability for appointment as Special Public Prosecutor in the criminal cases. At the same time, it provides that no order should be issued unless for the reasons to be recorded in writing, the Remembrancer of Legal Affairs is satisfied, having regard to the nature of the case, gravity of the matter and public interest involved in the matter and need for such appointment. In other words, before acceding to the request by any private party for appointment of a Special Public Prosecutor, it is necessary for the Remembrancer of Legal Affairs to get himself satisfied about the necessity about such appointment having regard to the nature of the case, gravity of the matter and public interest involved therein. Such satisfaction should be reflected from the order recorded in writing by the Remembrancer of Legal Affairs, while approving the appointment. Besides, the fact that the advocate to be appointed as the Special Public Prosecutor had been in practice for not less than ten years, as well as he is a person of general repute and has to his credit legal acumen, and suitable for appointment as a Special Public Prosecutor in any criminal cases or class of cases should also be considered, and

obviously, consideration of all these aspects should be reflected in the order in writing to be recorded by the Remembrancer of Legal Affairs.

16. Apart from the said rules, it is also to be noted that the Apex Court in **Mukul Dalal's case (supra)** has specifically warned that the appointment of the Special Public Prosecutor at the instance of a private party cannot be as a matter of course. The Apex court had further held that "the request for appointment of a Special Public Prosecutor should be properly examined by the Remembrancer of Legal Affairs and only when he is satisfied that the case deserves the support of a Public Prosecutor that such a person should be appointed to be in charge of the case." It has been further held that "the Remembrancer of Legal Affairs should scrutinise every request, keeping a prescribed guideline in view and decide in which cases such request should be accepted, keeping the facts of such case in view. Ordinarily the Special Public Prosecutor should be paid out of the State funds even when he appears in support of a private complainant but there may be some special case where the Special Public Prosecutor's remuneration may be collected from the private source."

17. The decision of the Apex Court in **Mukul Dalal's case (supra)** and the amended Rule 22 make it abundantly clear that apart from following the guidelines prescribed in the said decision for an appointment of the Special Public Prosecutors at the request of the private party, the Remembrancer of Legal Affairs must be satisfied that the case wherein such appointment is requested for deserves and the prevailing circumstances need the appointment of a Special Public Prosecutor. Besides that, a person to be appointed should be efficient one to conduct the case. Obviously, the points relating to the person's reputation and experience at bar should find place in the consideration by the Remembrancer of Legal Affairs. It should not be a mechanical exercise on the part of the Remembrancer of Legal Affairs. It has to be on consideration of all the relevant factors for the purpose of appointment of a Special Public Prosecutor in relation to a particular case or class of cases and the consideration thereof should be apparent from the order of appointment issued by such authority. Undoubtedly, the notification need not reflect the entire order itself and the authority would, undoubtedly, be entitled to justify the appointment by referring to such order in case there is any challenge to the appointment of a person to be

a Special Public Prosecutor. Even as regards the payment of fees of the Special Public Prosecutor, the quantum as well as the source of payment should not only be specified but should also be reasonable and justifiable.

18. Considering the provisions of law and the guidelines laid down by the Apex Court, it is clear that for the purpose of appointment of Special Public Prosecutor on request by a private party, the same should be preceded by a proper inquiry regarding the need for such appointment in the matter and the reputation, experience and ability of the advocate proposed to be appointed as Special Public Prosecutor and the same should be by the Remembrancer of Legal Affairs and the consideration of all these aspects should be reflected in the order passed in relation to such appointment. The order should disclose the application of mind by the Remembrancer of Legal Affairs to all the relevant factors.

19. Undisputedly, the notification in the Writ Petition No.1899 of 2004 was issued prior to coming into force of the said rule. It is, however, well settled law that merely because no guidelines are specifically prescribed, the authority is not divested

of the power given to it under a statutory provision to do a particular thing. Undoubtedly, when the law prescribes a specific mode for doing a particular thing, then the thing should be done in the prescribed mode, and not otherwise. Since at the relevant time, there was no rule on the statute book regarding the procedure to be followed in the matter of appointment of special public prosecutors at the request of the complainant as the rule 22 was already struck down and the amended rule was found to be contrary to the decision of the Apex Court in **Mukul Dalal's case (supra)**, we are left with no alternative than to ascertain whether the appointment in this case satisfies the guidelines laid down by the Apex Court in **Mukul Dalal's case (supra)**. The submission by the learned Advocate for the State that it can also be seen whether the procedure adopted for his appointment discloses substantial compliance of the rule prescribed for an appointment of a Special Public Prosecution at the instance of the concerned authority i.e under Rule 18 of the said rules, is devoid of substance. First of all, Rule 18 of the said rules does not deal with the procedure relating to Special Public Prosecutor at the instance of the officer, though the clauses (a) and (b) of Rule 18(2) are relevant in view of Rule 21(2). But that by itself

will not be sufficient. It will be absolutely necessary that the guidelines laid down by the Apex Court are not flouted. The decision was essentially in relation to the rule pertaining to the procedure to be followed while approving the appointment of an advocate as the Special Public Prosecutor at the request of a private party.

20. As regards the appointment of the respondent No.2 in the Writ Petition No.290 of 2005 is concerned, the notification of appointment having been issued after coming into force of the amended Rule 22, undoubtedly, the same has to be in accordance with the Rule 22 of the said Rules, as amended with effect from 13th September, 2004, read with the decision of the Apex Court in **Mukul Dalal's case (supra)**.

21. Since the notifications ex facie do not disclose, and in fact need not disclose, that the compliance of the rules relating to the appointment of the advocates as the Special Public Prosecutors or the guidelines laid down by the Apex Court in **Mukul Dalal's case (supra)**, and the respondents are obviously entitled to establish the compliance thereof by filing necessary affidavit along with the copies of orders of the appointment. In both the Petitions, the

affidavits-in-reply have been filed but they are not accompanied by any copy of the order of appointment of Special Public Prosecutor. Besides, the affidavits have been filed by Shri Prakash Joshi, Desk Officer, Law & Judiciary Department, Mantralaya, Mumbai. There is no affidavit filed by the Remembrancer of Legal Affairs. It is the contention of the learned Advocate for the State and the APP that in the Government matters, it is not necessary for the said authority to file affidavit-in-reply and what is relevant for the said authority is to establish the fact that the procedure prescribed for appointment of Special Public Prosecutor has been duly followed and if that can be established from the records, there need not be any affidavit-in-reply by the concerned authority, and in that regard, attention was drawn to the decisions of the Apex Court in **Kumaon Motor and Chandra Gupta's cases (supra)**. Drawing attention to the paragraph 19 of the said decision in **Kumaon Motor's case (supra)**, it is sought to be contended that the affidavit filed by the Deputy Secretary (Home Department), U.P. Government was considered to be the affidavit on behalf of the Government. Similarly, referring to the paragraph 28 of the decision of the Apex Court in **Chandra Gupta's case (supra)**, it has been submitted that when the order is challenged in the Court, it is

always open to the competent authority to place justification for such order before the Court, and therefore, the learned Advocate for the State has produced the files in relation to the appointment of the Special Public Prosecutors in both these petitions, while relying upon the affidavits filed by the Desk Officer and the contents thereof.

22. The Apex Court in **Kumaon Motor's case (supra)**, in the paragraph 19, had accepted the affidavit filed by the Deputy Secretary (Home Department), U.P.Government, Lucknow. The paragraph 19 of the said decision discloses that the Apex Court was dealing with an issue raised about failure of the Government to prove that it was satisfied about necessity and expediency for securing the defence of India and civil defence, the public safety, the maintenance of public order and the efficient conduct of military operations and for maintaining supplies and services essential to the life of the community and, therefore, that the order under challenge was passed. In that regard, the affidavits filed in the High Court were not quite clear on the said point and therefore, an opportunity was given to the State Government to show that the satisfaction of the State Government necessary before passing an order of that kind was arrived at in that

regard. The affidavit which was filed on behalf of the State Government on August 16, 1965 was of the officer of high rank i.e. Deputy Secretary (Home Department), U.P. Government, Lucknow, and not of any Desk Officer/Clerk or any other Clerk. Besides, the affidavit was filed on the basis of the records and the contents of the said affidavit were corroborated by those records. However, the said decision is not on the point as to who has to file the affidavit on behalf of the Government. Time and again it has been held by the Apex Court as well as this Court that a judgement is what it decides, and not what follows from it. The ratio of a judgment is to be understood with reference to the point that it deals with and decides. Advocates are expected to rely upon the decisions which are relevant to the point in issue, otherwise it results in sheer waste of time. Certainly the advocates appearing for the Government should shoulder higher responsibility to avoid such wastage of time, of course, it does not mean that others need not.

23. The decision in **Chandra Gupta's case (supra)**, the Apex Court was dealing with the issue relating to the extent of applicability of natural justice while considering the representation against the adverse

remarks and for expunging thereof, and had reiterated its earlier decision in **Union of India & Ors. v. E.G.Nambudiri**, reported in (1991)3 SCC 38 wherein it was held that "in governmental functioning before any order is issued the matter is generally considered at various levels and the reasons and opinions are contained in the notes on the file. The reasons contained in the file enable the competent authority to formulate its opinion. If the order as communicated to the government servant rejecting the representation does not contain any reason, the order cannot be held to be bad in law. If such an order is challenged in a court of law it is always open to the competent authority to place the reasons before the court which may have led to the rejected of the representation. It is always open to an administrative authority to produce evidence aliunde before the court to justify its action." However, that was a case wherein admittedly there was no rule or even administrative order for recording reasons while rejecting the representation, and therefore, it was held therein that "there is no dispute that there is no rule or administrative order for recording reasons in rejecting a representation. In the absence of any statutory rule or statutory instructions requiring the competent authority to record reasons in rejecting a

representation made by a government servant against the adverse entries the competent authority is not under any obligation to record reasons. But the competent authority has no licence to act arbitrarily, he must act in a fair and just manner. He is required to consider the questions raised by the government servant and examine the same, in the light of the comments made by the officer awarding the adverse entries and the officer countersigning the same. If the representation is rejected after its consideration in a fair and just manner, the order of rejection would not be rendered illegal merely on the ground of absence of reasons. In the absence of any statutory or administrative provision requiring the competent authority to record reasons or to communicate reasons, no exception can be taken to the order rejecting representation merely on the ground of absence of reasons. No order of an administrative authority communicating its decision is rendered illegal on the ground of absence of reasons *ex facie* and it is not open to the court to interfere with such orders merely on the ground of absence of any reasons. However, it does not mean that the administrative authority is at liberty to pass orders without there being any reasons for the same." Obviously, the decision was on the point of applicability of the principles of rule of

natural justice in cases while dealing with the representation against the adverse remarks in a situation where the rules do not require recording of reasons. That is not the case in hand. Apart from the fact that the said rules and the decision in **Mukul Dalal's case (supra)** specifically require recording of reasons for appointment of Special Public Prosecutor, at this stage, the point for consideration is who should establish the factum of consideration of various factors required to be considered for approval of appointment of Special Public Prosecutor.

24. The affidavits by the Desk Officer do disclose that certain facts were stated in the applications filed by the parties in an attempt to justify the appointment of the respective Advocates as the Special Public Prosecutors. In the Writ Petition No.1899 of 2004, the affidavit speaks of preparation of a detailed note by the concerned Desk Officer based on the application of the party and placement thereof before Joint Secretary who is stated to have approved the reasons given for appointment of the Special Public Prosecutor and thereafter the papers were placed before the Principal Secretary, who after considering the entire material, arrived at his opinion that it was an appropriate case for

appointment of a Special Public Prosecutor and that the Respondent No.2 was a fit person to be appointed as such. The affidavit further states that Principal Secretary was also aware of the aspects set out by the Apex Court in Mukul Dalal's case. As regards the Writ Petition No.290 of 2005 is concerned, it has been stated in the affidavit that the Remembrancer of Legal Affairs - Shri Deshpande had examined the application of Shri Danake i.e. Respondent No.1 on merit and in the light of the decision in Mukul Dalal's case, he came to the conclusion that it was a fit case for the appointment of Shri Shinde, Respondent No.2 as a Special Public Prosecutor, to conduct the trial, and passed order, after due application of mind as regards the merits of the case. It is also stated therein that considering the said application, a detailed note was prepared by the concerned Desk Officer and it was placed before the Joint Secretary who approved the reasons given for appointment of the Special Public Prosecutor and, thereafter, the papers were placed before the Principal Secretary and R.L.A. and after considering the entire material placed before him, he arrived at his opinion that it was appropriate case for the appointment of Special Public Prosecutor and that the Respondent No.2 was a fit person to be appointed as such.

25. As already observed above, the said rules require that the appointment of a Special Public Prosecutor has necessarily to be by a reasoned order in writing by the Remembrancer of Legal Affairs. The required criteria prescribed for an advocate to be appointed as Special Public Prosecutor is satisfied or not is necessarily to be considered by Remembrancer of Legal Affairs before engaging any Advocate as the Special Public Prosecutor in a particular case or class of cases. So also, consideration of involvement of the public interest in the matter or matters, as the case may be, is a pre-requisite for approval of the proposal for appointment of a Special Public Prosecutor and further that such a consideration has to be in accordance with the rules framed and the guidelines laid down by the Apex Court, and the same should be clearly revealed from the order itself, and such order should be by Remembrancer of Legal Affairs.

26. The reasoned order would obviously mean that the order should reflect consideration of all the relevant materials necessary for approval of the proposal regarding the appointment of the Special Public Prosecutor. Once an authority passing the order is required to disclose the consideration of the

relevant factors while passing the order itself, it is needless to say that the order on the face of it should disclose the said consideration. The law that an order passed by the statutory authority must be judged on the face of it, as the reasons contained therein cannot be supplemented on an affidavit, is well settled (Vide: **Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors.**, reported in AIR 1978 SC 851, and **Chandra Singh v. State of Rajasthan & Anr.**, reported in AIR 2003 SC 2889.) Undoubtedly, the order itself need not be reproduced in the notification regarding the appointment. But, when the appointment is challenged, certainly the respondents can place on record the copy of the order. An affidavit or mere production of records relating to such appointment before the Court would not be a substitute for such an order. Undoubtedly, there can be an exceptional case where the consideration of such factors may not be apparent on the face of the order yet the same could be revealed from the various contemporaneous materials on record which were considered by the concerned authority. Certainly the same can be stated by the concerned authority by way of an affidavit and established by production of the contemporaneous records, as consideration of such records would be

within the knowledge of the authority concerned or the authority who had considered all those records, and not to some other authority or person. Those factors are necessarily to be stated on solemn affirmation by the concerned authority, and therefore, in such a case, affidavit is required to be filed by the concerned authority and not by any other officer. The affidavit is neither a decorative piece on the record nor it is to be filed merely to add to the bulk of the petition. In any case, when the order is challenged on account of non-consideration of materials and non-application of mind by the concerned authority, the respondents cannot merely dump the records before the Court and leave it to the Court to scrutinise the records to satisfy itself about the consideration of those materials and application of mind by the concerned authority. It is primarily for the concerned authority to satisfy the Court about such consideration of the relevant materials and application of mind by such authority before passing the order and for that matter, it would be absolutely necessary for the concerned authority to file affidavit in that regard and not by any other person. Besides, the affidavit should be of relevant facts. What merits is the quality, what persuades is the authoritative statement, what recognises the authority

is the authorship of the decision. Being so, neither the quantity weighs, nor an unauthoritative statement counts.

27. The affidavit filed by the Desk Officer undoubtedly discloses a categorical statement in relation to the appointment of the Advocate Shri Girish Raghunath Shinde as Special Public Prosecutor that the same was consequent to the order of appointment passed by the Remembrancer of Legal Affairs in exercise of the powers vested under Section 24(8) of the Code of Criminal Procedure. However, no such statement is to be found in case of Advocate Shri Subhash Jha. The statement in that regard in the affidavit of the Desk Officer is merely to the effect that the Joint Secretary had approved the reasons given for appointment of the Special Public Prosecutor and thereafter, the papers were placed before the Principal Secretary who after considering the entire material placed before him, formed his opinion that it was appropriate case for the appointment of Special Public Prosecutor and that the respondent No.2 was to be appointed as such. Obviously, in case of Subhash Jha, there was no order issued by the Remembrancer of Legal Affairs. As already pointed out above, the rule 14(3)(a) of the said rules empowers the Remembrancer

of Legal Affairs to appoint a Special Counsel or Special Public Prosecutor. Undoubtedly his functions, powers and duties can be delegated taking resort to the rule 15 of the said Chapter II of the said rules. However, in the case in hand, it is nobody's case that such power was delegated to Principal Secretary or that under any other statutory provision having overriding effect over the said rules, the Principal Secretary is entitled to approve the appointment of Special Public Prosecutor.

28. Considering the fact that the concerned authority has not filed the affidavit, we have perused the records made available for our perusal to ascertain whether the claim by the Desk Officer regarding the legality of the notifications and the appointments thereunder, and to our surprise those records neither establish the said claim nor disclose any consideration of the relevant factors by the concerned authority.

29. In relation to the appointment of Advocate Shri Subhash Jha, as Special Public Prosecutor is concerned, the file in that regard placed before us bears No.SPR-1204/A.4, Law and Judiciary Department, Division-14. The same contains noting by the Desk

Officer, dated 28th January, 2004 informing that the Advocate Subhash Jha has already been appointed in Criminal Application No.5325 of 2003 in the High Court and that for further consideration of request of Shri Ravindra Ahuja for appointment of the said Advocate in Sessions Case at Thane and willingness of the Advocate to conduct the case on payment of professional fees of Rs.25,000/- and that further he is to be appointed in Bail Application No.1394 of 2003 on approval being granted for the same. The said noting is followed by the signatures of various officers. Perusal of the said records nowhere disclose any order having been passed by the Remembrancer of Legal Affairs appointing the Advocate Shri Subhash Jha, as the Special Public Prosecutor, for conducting all the cases arising out of C.R.I-301/2003 of Turbhe Police Station, Thane, in the Sessions Court, Thane, and this Court, nor the records disclose that the proposal for appointment of Advocate Shri Subhash Jha, as Special Public Prosecutor in any sessions case, was either approved by the Joint Secretary or by the Principal Secretary, though the statement in the affidavit of the Desk Officer is verified by him as true from the information gathered from the case records placed before us. The said records undoubtedly relate to the proceedings for appointment of the Advocate Shri

Subhash Jha as the Special Public Prosecutor in the case in hand but the same nowhere corroborate the said claim of the Desk Officer about approval of such appointment was by the proper authority and in the manner prescribed by law. On the contrary, the same disclose the contention of the Desk Officer in that regard to be far from the truth. Of course, the file also contains a note relating to the draft of the notification regarding the appointment of Special Public Prosecutor for all the cases in Thane court arising out of C.R.I-301/2003. The same is dated 10th February, 2005. However, the draft notification as well as the impugned notification in that regard is dated 12th March, 2004 and in fact issued and published prior to 3rd September, 2004 as there is a categorical statement on oath by the petitioner in the petition that a copy of the said notification was given to him on 3rd September 2004 and the said fact has not been denied or disputed by the respondents. All these facts obviously disclose that the appointment of Advocate Jha, as Special Public Prosecutor, was not approved by the concerned authority and the procedure laid down by the said rules as well as the guidelines laid down by the decision of the Apex Court in **Mukul Dalal's case (supra)** were not followed. And the claim of the

respondents as well as a categorical statement by Shri Prakash Joshi, Desk Officer, in that regard is not only incorrect but patently false.

30. The records in the file relating to this case reveal one more aspect of the matter. There are two letters from the Advocate Subhash Jha dated 20th December, 2003 and 19th January, 2004. In both the letters, Advocate Subhash Jha has categorically stated that the original complainant namely Ravindra Ahuja had requested Advocate Jha to represent him in the concerned matter to oppose bail to the accused. Undoubtedly, he has also stated in those letters that considering the importance and complex nature of matter, on payment of Rs.25,000/- as fees, he was giving his consent for his appointment as the Special Public Prosecutor. But the fact remains that he had shown his willingness to appear in the matter, not with the view to perform the duties of prosecutor fairly and impartially as is otherwise expected to be performed by any public prosecutor, but because he had been persuaded by his client Sri Ravindra Ahuja, the original complainant, to oppose the bail application of the accused. This obviously discloses the intention with which the learned Advocate had expressed his willingness to be Special Public

Prosecutor in the matter and resultant absence of the required impartiality while conducting the trial. It is well said that there should be on the part of the public prosecutor no unseemingly eagerness for or grasping at conviction. The duty of a public prosecutor is not merely to secure conviction of and imposition of punishment to the accused. It is his primary duty to place before the Court all the evidence collected by the investigating agency whether it be in favour or against the accused for proper consideration thereof by the Court. Utmost fair and impartial attitude and conduct is expected in that regard from a public prosecutor. Nearly half a century back, that it was ruled by the Apex Court in **The State of Bihar v. Ram Naresh Pandey and another**, reported in AIR 1957 SC 389 that the public prosecutor is an officer of the Court and he is bound to assist the Court with his fairly considered view and the Court is entitled to have the benefit of the fair exercise of his function. Even though an advocate is appointed as a special public prosecutor, he is essentially a prosecutor on behalf of and for the State. He is a counsel who conducts the prosecution on behalf of the Government. Any advocate who exhibits any personal interest or the interest of his client in the prosecution would be obviously anxious

to secure conviction of the accused at any costs. What impartiality and fairness in prosecution could be expected from such an advocate? How can such a person be said to be fit and appropriate advocate to be appointed as special public prosecutor in exercise of powers under Section 24(5) of the Criminal Procedure Code?

31. In the case of Advocate Shri Girish Raghunath Shinde, the file relating to his matter bears No.SPR-2804/2199/(213), Division 14. It contains the note regarding the proposal for appointment of Special Public Prosecutor on the basis of the application in that regard by the applicant and the opinion expressed on such proposal by the office of the Public Prosecutor objecting to the appointment of Special Public Prosecutor on the ground that the same is not necessary as the Public Prosecutors who are already employed are sufficiently experienced Public Prosecutors and capable to conduct the matter efficiently. However, the proposal in the last paragraph discloses the reason for the need of appointment of a Special Public Prosecutor to be that, in the facts and circumstances of the case to avoid the Government being blamed for the acquittal of the accused and as the applicant was willing to pay

remuneration of the Special Public Prosecutor, there could be no objection for appointment of the Special Public Prosecutor, if approved. The said note dated 10th September, 2004 is under the signature of Shri L.B.Bediskar, Desk Officer, and that is followed by various signatures and the notings to the effect that "may be considered. If approved, fees of Spl.P.P. shall be as per MOLR." Further notings by the Desk Officer are to the effect that considering the notings on the earlier page of the file, a draft of the notification was being submitted for approval at No.39. The draft at No.39 is dated 30th September, 2004. The file nowhere discloses either the proposal or the draft of the notification having been approved by the Remembrancer of Legal Affairs at any point of time. The records in the file are totally silent in that regard. Obviously, the claim by the Desk Officer regarding approval of the appointment of the Advocate Shri Shinde, as the Special Public Prosecutor by the Remembrancer of Legal Affairs, does not find any corroboration from the said records, and on the contrary, the said statement is also far from the truth.

32. The records placed before the Court in relation to the appointment of the Special Public

Prosecutor challenged in the Writ Petition No.1899 of 2004, undoubtedly disclose a note by the Desk Officer reproducing the contents of the application of the private party which relate to the reasons for appointment of such Special Public Prosecutor. However, it nowhere discloses any consideration thereof by any of the authorities. The consideration, if any, which is revealed from the records is by the Desk Officer and that too regarding the willingness of the private party to pay the charges of the Special Public Prosecutor and that, in order to avoid the situation whereby the Government could be blamed for acquittal of the accused on account of the failure to appoint a Special Public Prosecutor that the appointment should be approved. In any case, such a consideration cannot be said to be a consideration in accordance with the procedure prescribed either under the said Rules or under the guidelines laid down by the Apex Court in **Mukul Dalal's case (supra)**. The records nowhere disclose the application of mind by any of the authorities to the proposal for appointment of the respondent No.2 as Special Public Prosecutor in the case in hand.

33. As already stated above, the records pertaining to appointment of the respondent No.2 in

the Writ Petition No.290 of 2005 are also not different from those in case of the Writ Petition No.1899 of 2004. It is almost reproduction of the same procedure as in the earlier case, i.e. Writ Petition No.1899 of 2004. Being so, mere claim by the Desk Officer that all the relevant aspects were considered by the concerned authorities before approving the appointments of the Special Public Prosecutors in the cases in hand does not stand established even on the basis of the records produced before us.

34. It is well settled law that when the law prescribes a procedure for exercise of power by an authority, then the power has to be exercised in accordance with the prescribed procedure. The authority cannot choose to follow a different procedure at its pleasure. Any authority empowered to exercise certain functions under a statutory provision has to adhere to the procedure prescribed for exercise of such functions. Exercise of statutory powers circumscribed by the methodology for its exercise cannot choose the path of the choice of the officer, though minor bypasses, as exceptions, may perhaps be tolerable depending upon the facts and circumstances of each case. No such exception case is made out in

either of the matters.

35. The decision of the Apex Court in **Varada Rama Mohana Rao's case (supra)** is of no assistance to the respondents. That was a decision given in the peculiar facts of that case. However, at the same time, it was specifically ruled that:-

"This, however, does not mean that we approve the fact that a person who is admittedly on bad terms with the accused should be appointed as a prosecuting counsel unless for good reasons."

36. Though the appointments of the Special Public Prosecutors are sought to be challenged on the other grounds, it is not necessary for us to address to those grounds as the appointments cannot be sustained for the reason stated above, as there is complete failure on the part of the respondents to follow the procedure in the matter and the appointments having been made in breach of the procedure and the decision-making process being in total disregard to the mandatory provisions of law prescribed for an appointment of a Special Public Prosecutor.

37. The fall-out of the above discussion is that:-

- (1) The procedure established by the said rules as well as the guidelines laid down by the decision of the Apex Court in **Mukul Dalal's case (supra)** for appointment of the Special Public Prosecutor requires a reasoned order in writing, disclosing consideration of all the relevant factors pertaining to such appointments, by the Remembrancer of Legal Affairs.
- (2) There is no such order in writing issued by the Remembrancer of Legal Affairs approving the appointment of the concerned Advocate as the Special Public Prosecutor in either of the cases.
- (3) In both the cases, the criteria which was required to be followed for the decision regarding appointment of the Special Public Prosecutor has not been followed. Neither the need for such appointment has been considered nor

the suitability of the concerned Advocate for conducting the matters is ascertained, nor the point as to whether any public interest is involved in the matter has been seen. In short, neither the requirement of the Rule 22 of the said rules nor the guidelines laid down by the Apex Court in **Mukul Dalal's case (supra)** have been complied with.

(4) The letters issued by the Advocate Shri Subhash Jha apparently disclose that the Advocate is interested in appearing in the matter, not to perform the duties of the Public Prosecutor impartially and in all fairness but as an Advocate for his client Shri Ravindra Ahuja, who is the complainant in the case.

(5) In case of Advocate Shri Subhash Jha, the draft related to the impugned notification itself was prepared in the month of February, 2005, much after the filing of the petition,

while the notification was published prior to 3rd September, 2004 without any approval for his appointment as the Special Public Prosecutor.

(6) Inspite of knowing well that the records do not disclose the appointments of the respondents Nos.2 in both the petitions were approved by the competent authority and that therefore, the impugned notifications cannot be proved to have been issued legally, yet the respondents insisted to contend that those notifications and the alleged appointments thereunder were lawful and legal, and therefore, while allowing the petitions and quashing the impugned notifications, it is also necessary to saddle the respondents with exemplary costs in both the petitions.

(7) The statements of Shri Prakash Joshi, Desk Officer, in the affidavits filed in both the matters, to his knowledge were contrary to the records, and

therefore, patently false in relation to the appointment of the concerned Advocates as the Special Public Prosecutors and the alleged approval for such appointments, and yet did not hesitate to affirm those statements on oath and thereby tried to mislead the Court on the relevant aspect of the matter and therefore, Sri Prakash Joshi, Desk Officer, warrants necessary proceedings against him.

38. In the result, therefore, both the petitions succeed, and we pass the following order:-

- (i) The impugned notifications appointing the respondents Nos.2 in both the petitions as the Special Public Prosecutors cannot be sustained, and are therefore, hereby quashed and set aside and the petitions are allowed in terms of prayer clause (b) in the Criminal Writ Petition No.1899 of 2004, and in terms of prayer clause (A) in the Criminal Writ Petition No.290 of 2005.

- (ii) The respondent-State is directed to pay the cost of Rs.5,000/- in each of the petitions. The costs to be deposited in the Registry within a period of eight weeks from today and on such deposit of the costs, the same shall be credited to the account of Maharashtra State Legal Services Authority.

- (iii) The Chief Secretary to the Government of Maharashtra either by himself or through any other officer, not below the rank of Secretary to the State Government, shall inquire, as expeditiously as possible, as to how the impugned notifications came to be issued without prior order in writing by the Remembrancer of Legal Affairs approving the appointments of the concerned Advocates as the Special Public Prosecutors and to fix responsibility in that regard and to take appropriate action in accordance with the provisions of law including

the one for the recovery of the amount of costs payable in terms of the clause (ii) hereinabove, and to file compliance report in the Court on or before 30th November, 2005.

- (iv) It is necessary to issue a show cause notice to Shri Prakash Joshi, Desk Officer, Law & Judiciary Department, Mantralaya, Mumbai, as to why he should not be held guilty of contempt of Court on account of making false statements in the affidavits filed by him in both the petitions and why he should not be punished for the same.
- (v) The xerox copies prepared of the entire records placed before us in relation to the appointment proceedings in the matters in hand, are directed to be verified by the Associate of this Court, who shall ascertain the same to be true copies of the original records and accordingly certify the same and affix her initial on each page of such

copies and those true copies shall be kept along with the records pertaining to the petitions which are being disposed of by this judgment, whilst the original records should be returned to the learned Advocate and the learned APP for the State.

(vi) The Registry is directed to forward the copy of this judgment to the Chief Secretary, Government of Maharashtra for necessary compliance of the directions issued in the judgment.

(vii) Rule in both the petitions is made absolute in above terms.

(R.M.S.KHANDEPARKAR, J)

(P.V.KAKADE, J)